Supreme Court, U.S.
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No. 02-1454

In the

Supreme Court of the United States

SEMINOLE ENTERTAINMENT, INC., dba RACHEL'S,

Petitioner,

v.

CITY OF CASSELBERRY, FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Seminole Entertainment, Inc., d/b/a Rachel's ("Rachel's") was licensed to operate in the City of Casselberry, Florida ("Casselberry") as an adult entertainment establishment, featuring striptease/erotic dancing. Following a lengthy undercover investigation by the Seminole County Sheriff's Office and the City/County Investigative Bureau, law enforcement agents obtained evidence that the management of Rachel's was permitting prostitution and other prohibited sexual activity, lewd activity, and drug sales and use to occur on its premises. As a result of this evidence, several arrests were made. Additionally, Casselberry served Rachel's with a notice of intent to revoke its adult entertainment license. A revocation hearing was subsequently held. Based upon the evidence of illegal and prohibited activity that had been occurring on the Rachel's premises that was established at the revocation hearing, Casselberry revoked Rachel's adult entertainment license for a period of two years, effective February 1, 2001.

Rachel's then began its series of attacks on the revocation of its adult entertainment license in both state and federal court. In state court, Rachel's instituted an action to enjoin enforcement of the revocation order, as well as a separate action for certiorari review of the revocation order. Specifically, on February 1, 2001, Rachel's instituted an action in the Circuit Court for the Eighteenth Judicial Circuit, in and for Seminole County, Florida ("circuit court"), for declaratory judgment and permanent injunction ("injunction action"). *See Seminole Entertainment, Inc. v. City of Casselberry*, No. 01-CA-248-16P (Fla. 18th Cir. Ct.). One month later on March 2, 2001, Rachel's

instituted its action in the circuit court seeking certiorari review of the revocation of its adult entertainment license ("certiorari action"). *See Seminole Entertainment, Inc. v. City of Casselberry*, No. 01-23-AP (Fla. 18th Cir. Ct.).

In the injunction action, Rachel's filed a request for a temporary injunction enjoining the enforcement of the revocation order. That request was denied, which resulted in Rachel's appealing that decision to the Florida Fifth District Court of Appeal. The Fifth District Court reversed the denial of the motion for temporary injunction with directions to the circuit court to enter the temporary injunction. *See Seminole Entertainment, Inc. v. City of Casselberry*, 811 So. 2d 693 (Fla. 5th DCA 2001) ("*Rachel's I*").

With the temporary injunction in place enjoining the enforcement of the revocation order, the certiorari action was resolved with the circuit court issuing an order denying Rachel's petition for writ of certiorari. Rachel's then sought certiorari review of that decision in the Fifth District Court of Appeal. The Fifth District Court denied Rachel's petition for writ of certiorari, and in its opinion, also ordered that the temporary injunction entered pursuant to the *Rachel's I* decision expired automatically with issuance of the opinion denying certiorari relief. *See Seminole Entertainment, Inc. v. City of Casselberry*, 813 So. 2d 186 (Fla. 5th DCA 2002) ("*Rachel's II*").

The circuit court thereafter resolved the injunction action by entering summary judgment in favor of Casselberry. Rachel's appealed that decision to the Fifth District Court of Appeal, and that appeal remains pending. *See Seminole Entertainment, Inc. v.*

City of Casselberry, No. 5D02-3605 (Fla. 5th DCA).

Rachel's also sought certiorari review in the Florida Supreme Court of the Fifth District Court's *Rachel's II* decision; that petition for writ of certiorari was denied. *See Seminole Entertainment, Inc. v. City of Casselberry*, 835 So. 2d 269 (Fla. 2002). Rachel's now seeks certiorari review of the *Rachel's II* decision in this Court.

While all of this activity was ongoing in state court, Rachel's was also prosecuting an action for declaratory judgment and injunction in the District Court of the United States for the Middle District of Florida. Rachel's efforts in that arena failed, too, with the district court granting Casselberry's motion for summary judgment on Rachel's claims. *See Koziara v. City of Casselberry*, 239 F. Supp. 2d 1245 (M.D. Fla. 2002).

ARGUMENTS FOR DENYING THE PETITION

This case is the latest of Seminole Entertainment, Inc.'s (hereinafter referred to as "Rachel's") many efforts to challenge Casselberry's revocation of Rachel's adult entertainment license. Like Rachel's previous efforts to have the decision revoking its adult entertainment license quashed, this effort must fail too.

Rachel's contends this Court should accept jurisdiction over this matter in order to resolve the conflict among the federal circuit courts of appeals and the state courts on the issue of whether a prompt judicial determination is required in adult entertainment licensing decisions in order to satisfy the "prompt judicial review" standard mandated by *Freedman v. Maryland*, 380 U.S. 51 (1965) and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). Additionally, Rachel's requests that this Court accept jurisdiction over this matter because the lower court's decision conflicts with opinions of this Court pertaining to due process violations since the Casselberry City Commission did not disqualify itself from presiding over the revocation hearing. This case does not present a valid basis upon which this Court should exercise certiorari jurisdiction, and accordingly, Rachel's Petition for a Writ of Certiorari should be denied.

I. **The Fifth District Court of Appeal did not address either of the issues raised by Rachel's in its Petition for a Writ of Certiorari, and therefore, this case does not adequately present these matters to this Court for review.**

Rachel's seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257, which vests this Court with certiorari jurisdiction to review certain "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). The District Court of Appeal for the Fifth District of Florida is an intermediate appellate court. However, since the Florida Supreme Court, which is Florida's highest appellate court, declined to grant certiorari review of the Fifth District Court's decision, the Fifth District Court is the "highest court" of this State on this matter for the jurisdictional purposes of 28 U.S.C. § 1257(a). Accordingly, the "final judgment or decree" that is before this Court for review is the opinion on this matter that was issued by the Fifth District Court of Appeal, which is reported at *Seminole Entertainment, Inc. v. City of Casselberry, Florida*, 813 So. 2d 186 (Fla. 5th DCA 2002); the circuit court's rulings and written opinion are not matters with which this Court should be concerned.

In order to understand the basis for the Fifth District Court's decision, one must understand the process by which a party may seek review of quasi-judicial decisions of administrative bodies in Florida. Under Florida law, review of quasi-judicial decisions of administrative bodies, including city commissions, may be had under a two-tiered certiorari review system. Under this system, once a city commission renders its

decision, the parties may seek certiorari review in the state circuit court (trial court). *Dusseau v. Metropolitan Dade County Bd. of County Comm'rs*, 794 So. 2d 1270, 1273-74 (Fla. 2001) (quoting *Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000)). This "first-tier" certiorari review is not discretionary, but rather is a matter of right, and therefore is more akin to plenary appeal. *Id.* The scope of the circuit court's first-tier certiorari review is limited to whether (1) procedural due process was accorded, (2) the essential requirements of law were observed, and (3) the administrative findings and judgment are supported by competent substantial evidence. *Deerfield Beach v. Valliant*, 419 So. 2d 624, 626 (Fla. 1982). After the circuit court renders its decision on the petition for writ of certiorari, a party may seek "second-tier" review by seeking certiorari review of the circuit court decision in the district court of appeal. *Dusseau*, 794 So. 2d at 1274 (quoting *Florida Power & Light*, 761 So. 2d at 1092). The district court, upon review of the circuit court's judgment, determines whether the circuit court (1) afforded procedural due process and (2) applied the correct law. *Valliant*, 419 So. 2d at 626. The district court, on second-tier certiorari review, may not review the record to determine whether the city commission's decision is supported by competent, substantial evidence. *Florida Power & Light*, 761 So. 2d at 1092-93.

In this case, the circuit court addressed the merits of the two arguments that Rachel's raised in the Petition for a Writ of Certiorari that it filed with this Court and rejected them; the circuit court determined that Rachel's was afforded procedural due process, the essential requirements of law were observed, and the Casselberry City Commission's findings and judgment to revoke Rachel's adult entertainment license were

supported by competent substantial evidence. *See Seminole Entertainment, Inc. v. Casselberry*, 8 Fla. L. Weekly Supp. 613a (Fla. 18th Jud. Cir. July 17, 2001).[1] Specifically, the circuit court rejected Rachel's "prompt judicial review" argument on the basis that this case does not involve a prior restraint on expression; rather, the revocation of Rachel's adult entertainment license was punishment for Rachel's knowingly allowing unlawful and prohibited activity to occur on its premises. *See id.* Additionally, the circuit court decided that in licensing cases such as this, "prompt judicial review only means access to prompt judicial review, not prompt judicial decision and certainly not the right of the executive branch to mandate how quickly the judicial branch does its business." *See id.* at _____.[2] Further, the circuit court adopted the reasoning of the Eleventh Circuit Court of Appeals in *Boss Capital v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999), *cert. denied*, 529 U.S. 1020 (2000), which specifically declared Casselberry's adult entertainment licensing scheme constitutional. *Seminole Entertainment, Inc.*, 8 Fla. L. Weekly Supp. 613a.

Rachel's second argument, which asserts a due process violation because the Casselberry City Commission did not disqualify itself from presiding over the revocation hearing, was rejected by the circuit court on the basis that under the facts of this case, the City Commission was precluded by Florida Statutes and the

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[1] *Seminole Entertainment, Inc. v. Casselberry*, 8 Fla. L. Weekly Supp. 613a (Fla. 18th Jud. Cir. July 17, 2001) is included at Appendix C, which is pages 21 through 29, of the Appendix to Rachel's Petition for a Writ of Certiorari.

[2] *See* pages 22 and 23 to the Appendix to Rachel's Petition for a Writ of Certiorari.

Rules of the Florida Commission on Ethics from disqualifying itself. *See id.* at ___ (citing Ch. 112, Fla. Stat.; § 112.3143(3)(a), Fla. Stat.; § 286.012, Fla. Stat.; Op. Fla. Comm. Ethics 79-14 (1979)). The circuit court noted that it was also "guided" by this Court's opinion in *Hortonville Joint School District #1 v. Hortonville Education Ass'n*, 426 U.S. 482 (1976). *See id.* However, the circuit court's basis for rejecting this argument was founded on Florida Statutes and the Rules of the Florida Commission on Ethics, not the *Hortonville* opinion. *See id.*

After failing in the circuit court in its efforts to have the decision revoking its adult entertainment license quashed, Rachel's sought second-tier certiorari review of the revocation in the Fifth District Court of Appeal. The Fifth District Court then analyzed the case within the confines of its limited scope of review, and concluded in relevant part as follows:

> *As to whether the circuit court afforded Rachel's procedural due process, in its petition for certiorari Rachel's does not even contend to the contrary.* Rather, in asserting a due process argument, Rachel's improperly argues that it was not afforded procedural due process in the hearing before the city commission. Arguments as to the alleged lack of due process before the city commission were properly presented to the circuit court but are beyond the scope of the due process review available here.
>
> *As to whether the circuit court applied the correct law, the certiorari*

petition filed by Rachel's once again primarily and improperly focuses on alleged legal errors committed during the city commission proceedings, not the application of incorrect law by the circuit court during the certiorari proceedings. Such arguments are not properly before us for review. The only arguments directed toward the circuit court's alleged application of incorrect law were as follows:

. . . .

> (3) The circuit court applied the incorrect law in finding that the prompt judicial review constitutionally mandated in prior restraint cases simply means prompt judicial access, not a prompt judicial decision.

However, in support of each of these arguments, Rachel's simply contends that the circuit court came to an incorrect legal conclusion based on the facts before it. As such, its arguments do not support a reversal in this second tier certiorari proceeding.

The remaining arguments raised by Rachel's relate to whether there was error in the conduct of the hearing by the city commission or evidentiary rulings made during that hearing. *Those issues were for determination by the circuit court in its*

> *first tier certiorari review and do not support a granting of second tier certiorari by this court. . . .*
>
> We deny Rachel's petition for writ of certiorari. . .

Rachel's II, 813 So. 2d at 188 (emphasis added) (footnote omitted).

As its opinion indicates, the Fifth District Court of Appeal did not address either of the issues that Rachel's has raised in the Petition for a Writ of Certiorari that it has filed with this Court. The Fifth District Court correctly applied Florida law which limits the scope of second-tier certiorari review and denied Rachel's request for relief because each of the arguments Rachel's raised before it either were beyond the scope of its second-tier certiorari review, or did not "support a reversal" in the second tier certiorari proceeding. *Id.* at 189. Accordingly, Rachel's contention on page 13 of its Petition for a Writ of Certiorari that the Fifth District Court of Appeal addressed and decided the "prompt judicial review" standard is simply false. Since the Fifth District Court of Appeal did not address either of the issues that Rachel's has raised before this Court on the merits, the "highest court" of Florida has not rendered a decision on these matters, and therefore, this Court should decline to exercise jurisdiction to review this case.

II. **Assuming arguendo that "prompt judicial review" under *Freedman*, 380 U.S. 51 and *FW/PBS, Inc.*, 493 U.S. 215, mandates "prompt judicial decision," and that disqualification of the entire City Commission was necessary, the facts of this case are so one-sided that Rachel's adult entertainment license still would have been revoked and Casselberry still would have prevailed in all court proceedings even if the City Commission had disqualified itself and the revocation proceedings had been heard and decided by another body.**

Prior to the revocation of its adult entertainment license, Rachel's had been operating as an adult entertainment establishment featuring striptease/erotic dancing in Casselberry for approximately ten years. Such entertainment was a permitted activity under Casselberry's adult entertainment code.[3]

Following a lengthy undercover investigation by the Seminole County Sheriff's Office and the City/County Investigative Bureau, law enforcement agents obtained evidence that the management of Rachel's was permitting prostitution and other prohibited sexual activity, lewd activity, and drug sales and use to occur on its premises. As a result of this evidence, several arrests were made. Additionally, Casselberry served Rachel's with a notice of intent to revoke its adult entertainment license. A revocation hearing was subsequently held. Based upon the

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[3] As previously stated, Casselberry's adult entertainment licensing scheme was expressly declared to be valid in *Boss Capital*, 187 F.3d 1251.

evidence of illegal and prohibited activity that had been occurring on the Rachel's premises that was established at the revocation hearing, Casselberry revoked Rachel's adult entertainment license for a period of two years, effective February 1, 2001.

It is well established that a governmental agency may, via enforcement of a penal statute or ordinance, impose sanctions on unlawful, nonexpressive activity, even if such unlawful, nonexpressive activity is occurring in a premises where constitutionally protected expression is also occurring. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). Further, one may not hide behind expressive, constitutionally protected activity in order to avoid the consequences of his unlawful, non-expressive conduct. *See id.*

In this case, there was a plethora of evidence that unlawful and prohibited activity was occurring on the Rachel's premises, and that the management of Rachel's had full knowledge of the unlawful and prohibited activity. In the face of these facts, any reasonable body presiding over the hearing regarding the revocation of Rachel's adult entertainment license would have revoked Rachel's adult entertainment license. Further, under the facts of this case, the ability to obtain a prompt, or even immediate, judicial decision regarding the propriety of the revocation of Rachel's license would not have resulted in any decision other than a decision to uphold the revocation of Rachel's adult entertainment license. Simply stated, the facts of unlawful and prohibited activity in this case are so abundant and so one-sided that Rachel's adult entertainment license still would have been revoked and Casselberry still would have prevailed in all court proceedings even if the City Commission had disqualified itself and even if the

revocation proceedings had been heard and decided by another body. Accordingly, this case does not merit having this Court exercise certiorari jurisdiction over it.

III. This case does not present a justiciable controversy.

As this Court explained in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000),

> A case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. The underlying concern is that, when the challenged conduct ceases such that there is no reasonable expectation that the wrong will be repeated, then it becomes impossible for the court to grant any effectual relief whatever to the prevailing party. In that case, any opinion as to the legality of the challenged action would be advisory.

(internal citations and quotation marks omitted).

Rachel's adult entertainment license was not permanently revoked, it was merely revoked for a period of two years, effective February 1, 2001. The period of the revocation has been served. In fact, Rachel's applied for and was granted a new adult entertainment license, and is open and operating once again as an adult entertainment establishment featuring striptease/erotic dancing in Casselberry. Since the period of the revocation of Rachel's adult entertainment license has passed, since the basis upon which Rachel's adult entertainment license was revoked (i.e., the illegal

and prohibited activity that Rachel's management was permitting to occur on the premises) would not independently form the basis for any new revocation of Rachel's adult entertainment license, and since there is no reasonable expectation that Rachel's management will permit such unlawful and prohibited activity to occur on its premises in the future, it is impossible for this Court to "grant any effectual relief" to Rachel's in this matter. *See id.* Any opinion which this Court could issue in this case would be merely advisory. Thus, this matter is moot and no longer presents a justiciable controversy for this Court to resolve. This Court should decline to exercise jurisdiction over this case and should deny Rachel's Petition for a Writ of Certiorari.

CONCLUSION

For the foregoing reasons, the City of Casselberry respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

RESPECTFULLY SUBMITTED,

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